No. 78-990

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

CLIFFORD BAILEY, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES T. COGDELL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The pervasive theme of respondents' brief is that they were denied the right to a jury trial on the question whether their escapes from the District of Colum-

bia Jail were the result of coercion. Despite the fact they did not present evidence to satisfy the return and immediacy requirements of the defense of duress to escape, respondents argue that the jury should have been instructed concerning duress: in their view, the absence of proof of a truly immediate threat of serious physical harm and of a prompt return to custody should simply have been factors for the jury to consider in assessing the credibility of their claims that they fled the jail under duress and without what they assert to be the requisite intent to avoid normal conditions of confinement (Resp. Br. 39, 52, 55-62, 100, 122). This argument rests upon a fundamental misperception of the duress defense when raised in an escape prosecution and of the respective roles of the trial judge and the jury in the criminal process.

As explained in our opening brief (Govt. Br. 26-34), the rule that a defendant can invoke the duress defense only if he acted from a fear of immediate and serious harm and (in the prison escape context) if he promptly surrendered to proper authorities or to a responsible intermediary is not a mere evidentiary guidepost that the jury is free to ignore in determining whether the defendant should be excused from responsibility for his criminal conduct under a broader, undefined principle of compulsion. The immediacy and return requirements are themselves substantive elements of the duress defense on which the defendant must introduce sufficient evidence to warrant submitting the defense to the jury. This respondent failed to do.

1. Respondents do not—and could not—argue that they presented evidence from which the jury could have found that they satisfied the return requirement, as that requirement has been interpreted by the case law (see Govt. Br. 29-34, 42-51).[1] Nor did the court of appeals dispute the district court's finding that they had not presented such evidence (App. 219-220; Tr. 778-779). Respondents maintain instead that prompt return should not be an essential element of the duress defense. They argue (Resp. Br. 52-71) that failure to return should be only one factor for the jury to consider in determining whether an escaped prisoner was actually motivated by fear of death or serious bodily injury at the time he fled from custody and that insistence on return in all cases therefore interferes with the jury's fact-finding function.

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[1] Respondent Walker's testimony that he telephoned the FBI from an undisclosed location, even if believed, would fall significantly short of satisfying the continuing obligation to surrender or to make a bona fide effort to do so. Although respondent testified that he received no assurance that he would not be returned to the D.C. Jail, he had no right to insist on this; at most, he could have sought assurances, either personally or through a court or intermediary, that the allegedly threatening conditions at the Jail would not recur. Respondent Bailey's passing assertion (App. 175; Tr. 587) that he had someone else call the Jail falls even further short of a bona fide effort to surrender, as does respondent Cooley's ambiguous testimony about telephone calls (assuming that it refers to calls his family made to the authorities rather than to calls to Cooley (see App. 118-119; Tr. 406-407)). Respondent Cogdell did not proffer any evidence of communication with public officials.

But the duress defense—which, after all, excuses otherwise criminal activity—is properly raised in any context only if some evidence is introduced to show that the perceived threat lasted for the duration of the unlawful conduct and that, during this period, the defendant had no opportunity to avoid the threatened harm through lawful means.[2] The requirement that the prisoner return to custody or surrender to a public official, lawyer, court, or responsible intermediary with a view toward a prompt return to safe custody[3]

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[2] See, *e.g.*, *United States* v. *Wood*, 566 F.2d 1108, 1109 (9th Cir. 1977); *D'Aquino* v. *United States*, 192 F.2d 338, 358 n.11, 359 (9th Cir. 1951), cert. denied, 343 U.S. 935 (1952); *Gillars* v. *United States*, 182 F.2d 962, 976 n.14 (D.C. Cir. 1950); *R.I. Recreation Center* v. *Aetna Casualty & Surety Co.*, 177 F.2d 603, 605 (1st Cir. 1949); *Shannon* v. *United States*, 76 F.2d 490, 493 (10th Cir. 1935); *People* v. *Wester*, 237 Cal. App. 2d 232, 46 Cal. Rptr. 699 (1965); *M'Growther's Case*, 168 Eng. Rep. 8 (K.B. 1746); W. LaFave & A. Scott, *Handbook on Criminal Law*, § 49, at 378 (1972); Note, *Duress and the Prison Escape: A New Use for an Old Defense*, 45 S. Cal. L. Rev. 1062, 1065-1067 (1972). See also *Respublica* v. *McCarthy*, 2 U.S. (2 Dall.) 86 (Sup. Ct. Pa. 1781).

Contrary to respondents' claim (Resp. Br. 51), the court in *Respublica* v. *McCarthy* appears to have explained to the jury, in a manner largely indistinguishable from this case (App. 224-225; Tr. 806-807), why the duress defense to the charge of treason was unavailable as a matter of law if the defendant remained with the British forces for an extended period.

[3] Respondents presented no evidence that these alternatives to remaining at large were unavailable or that they resorted to them. Respondents point out (Resp. Br. 22-24, 30, 79-81) that they presented or proffered evidence in an effort to explain their admitted failure to return. However, their alleged concern about conditions at the D.C. Jail that they claim

is but an application of this general principle in the specific context of prison escape. Put another way, an inmate has a continuing, affirmative obligation to submit to custody that is free of truly threatening conditions; his escape, in order to be excused, can be no more than the temporary and limited departure necessary to place himself in that custody.

In an attempt to meet these arguments, respondents rely (Resp. Br. 56-61) on several state decisions which, they suggest, have wholly discarded the return requirement as a precondition to submitting the duress defense to the jury.[4] Two of the state cases which they cite, *People* v. *Luther*, 394 Mich. 619, 232 N.W. 2d 184 (1975), and *People* v. *Unger*, 66 Ill. 2d 333, 362 N.E. 2d 319 (1977), did hold that

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led to their escape did not warrant resort to the further self-help measure of remaining at large. They had an affirmative obligation to resort to other measures to enable them to return to custody safely. Thus, their evidence, even if it furnished a credible *explanation* for their failure to return, would not furnish a legal *excuse* for their conduct.

[4] Respondents also cite (Resp. Br. 54-55) *People* v. *Lovercamp*, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974). Contrary to respondents' assertions, however, the court in *Lovercamp* made clear that the defense is unavailable unless the defendant makes a prima facie showing that each of the elements of the defense it identified was satisfied, and it reversed the conviction only after considering the evidence as it bore on each of those elements. 43 Cal. App. 3d 831-832, 118 Cal. Rptr. at 115-116; accord, *United States* v. *Michelson*, 559 F.2d 567, 570 (9th Cir. 1977).

Since the filing of our opening brief, one additional jurisdiction has adopted the *Lovercamp* formulation of the duress defense in the prison escape context. See *State* v. *Cross*, 58 Ohio St. 482, 486, 391 N.E. 2d 319, 323 (1979).

strict compliance with all five of the conditions identified in *People* v. *Lovercamp*, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974), is not required and that the failure to satisfy these criteria was a matter for the jury to consider in determining whether the defendant in fact acted under duress. But in *People* v. *Luther*, the defendant was captured just eight hours after the escape; similarly, in *People* v. *Unger*, the defendant was apprehended only two days after his escape, and the court stressed that the defendant testified he intended to return once he found someone who could help him (66 Ill. 2d at 343, 362 N.E. 2d at 323). Under these circumstances, where the defendant may not have had a reasonable time in which to compose himself and develop a plan for surrender, it is understandable that the courts would not reject the duress defense on the ground that the defendant had not already reported to authorities.[5] It is not at all clear that even the *Luther* and *Unger* courts would be prepared to permit a defendant to raise a duress defense if he, like respondents, made no serious effort to turn himself in for at least a month after his departure.[6]

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[5] Indeed, in *Lovercamp* itself the court dispensed with the requirement of an "immediate return" in favor of a requirement of an intent to return, because the defendant had been apprehended right after her escape. 43 Cal. App. 3d at 832, 118 Cal. Rptr. at 116.

[6] The other state case relied upon by respondents, *Esquibel* v. *State*, 91 N.M. 498, 576 P.2d 1129 (1978), did reject a requirement of strict compliance with the *Lovercamp* conditions, but involved no question of the defendant's failure to return.

2. Alternatively, respondents argue (Pet. Br. 82-98)—contrary to the holding of every court of appeals that has considered the question (Govt. Br. 32-33), including the court below (Pet. App. 10a)—that a defendant cannot be guilty of escape under 18 U.S.C. 751 merely because he fails to return to custody after an initial departure that was justified by duress. The common sense point underlying the uniform holding of the cases respondents urge the Court not to follow is that Congress, in enacting Section 751, could not have intended to permit a prisoner to remain free with impunity simply because his initial departure did not give rise to criminal liability under the circumstances (Pet. App. 10a n.17; see also Comment, *From Duress to Intent: Shifting the Burden in Prison-Escape Prosecutions*, 127 U. Pa. L. Rev. 1142, 1143 (1979)).

This principle was recognized at common law as well. For example, at common law, a prisoner whose delivery from restraint was effected by a rescuer without the prisoner's connivance or assent nonetheless was guilty of escape if he voluntarily remained at liberty following the rescue. 2 J. Bishop, *Criminal Law* § 1086, at 810 (9th ed. 1923). Similarly, if a prisoner's act of departure was directed or permitted by his jailer, his absence from custody was nonetheless punishable as an escape because "it is the duty of every man to submit himself to the restraints imposed by law." *Riley v. State*, 16 Conn. 47, 51 (1843); see also *Hobert & Stroud's Case*, 79 Eng. Rep. 784 (K.B.

~~282 N.W. 2d 184 (1979), and *People* v. *Unger*, 66~~

1630); 2 J. Bishop, *supra*, § 1093 at 812, § 1104 at 819.[7]

Later congressional action touching on Section 751 reflects this principle as well. In 1965, Congress authorized the Attorney General to permit prisoners to go on furlough, to place them in community treatment centers, and to authorize their participation in work release programs (18 U.S.C. 4082(c)). This

[7] Respondents attempt to show (Resp. Br. 85-86) that Section 751 covers only the actual departure from custody by citing brief passages in five pre-1930 state cases that make reference to the act of departure. Four of the cases involved the responsibility of the public official having custody of the prisoner for permitting the prisoner to depart. In such a situation, the official's crime would be complete as soon as he permitted the prisoner to depart from his control, and there would have been no reason for the court to consider the significance of the prisoner's remaining at liberty. The fifth case, *Whitaker* v. *Commonwealth*, 188 Ky. 95, 221 S.W. 215 (1920), concerned a prisoner who unsuccessfully sought to justify his escape on the ground that his confinement was unlawful. He voluntarily left custody, and again there was no occasion to consider any question relating to his continued absence from custody.

Nor can respondents obtain any support from *Orth* v. *United States*, 252 F. 566 (4th Cir. 1918) (see Resp. Br. 87), which held that a person who had aided a prisoner after his departure from prison could not be convicted of assisting an escape. The federal statute in effect at the time separately prohibited assisting an escape and harboring a prisoner who had already escaped (*Orth* v. *United States*, *supra*, 252 F. at 570; see also 18 U.S.C. 752, 1072), and it is not surprising that the court insisted that the defendant be charged only with the crime that the evidence supported. At common law, a single offense covered both assisting the departure and the subsequent harboring. See 2 J. Bishop, *supra*, § 1102 at 818; 2 W. Hawkins, *A Treatise of the Pleas of the Crown*, ch. 29, § 26, at 448 (6th ed. 1787).

legislation specifically provides (18 U.S.C. 4082(d) (emphasis added)):

> The willful failure of a prisoner to remain within the extended limits of his confinement, *or to return within the time prescribed* to an institution or facility designated by the Attorney General, *shall be deemed an escape from custody of the Attorney General punishable as provided in chapter 35 of this title* [which includes 18 U.S.C. 751-757].

This provision makes clear Congress' understanding that the concept of escape embraces the failure to return following lawful departures. S. Rep. No. 613, 89th Cong., 1st Sess. 3 (1965); *Rehabilitation of Federal Prisoners: Hearing on H.R. 6964 Before Subcom. No. 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 6 (1965). See also *United States* v. *Phipps*, 543 F.2d 576 (5th Cir. 1976); *United States* v. *Vaughn*, 446 F.2d 1317, 1318 (D.C. Cir. 1971).

Respondents argue, however (Resp. Br. 89-95), that their failure to return can give rise to criminal liability only if escape under 18 U.S.C. 751 is a "continuing offense," which, relying on cases utilizing that term in unrelated contexts, they contend it is not. Contrary to respondents' assertion, the validity of the return requirement does not depend on characterizing escape as a "continuing offense." If the crime of escape is viewed as instantaneous in nature, necessarily complete and terminated at the moment of departure, the return requirement would properly be viewed as a condition subsequent to the initial de-

parture that must be satisfied in order to invoke the affirmative defense of duress.

But a number of courts (Govt. Br. 32-33), including the court below (Pet. App. 26a n.52), have chosen to characterize escape under Section 751 as a "continuing offense" in the course of explaining that an inmate whose initial departure may be excused because occasioned by coercion (or mistake or intoxication) nonetheless has an obligation, once free, to return to custody when he is no longer subject to the coercion that led to his departure (or when he realizes his mistake, or is no longer intoxicated). This characterization of escape as an offense that continues into the period of unlawful liberty is consistent with the nature of an escape, which, unlike *attempted* escape, is consummated only if the prisoner actually attains his liberty for an appreciable period of time, "whether that be one minute or one hour or one year" (Pet. App. 62a, Wilkey, J., dissenting).

All of the cases cited by respondents that use the term "continuing offense" (Resp. Br. 89-92) were concerned with whether the defendant's conduct after his crime was complete and had given rise to criminal liability was nevertheless part of a "continuing offense" for purposes of certain procedural protections. See *Toussie* v. *United State*, 397 U.S. 112 (1970); *United States* v. *Kissel*, 218 U.S. 601 (1910); *United States* v. *Irvine*, 98 U.S. 450 (1878) (statute of limitations); *United States* v. *Cores*, 356 U.S. 405 (1958) (venue); *In re Snow*, 120 U.S. 274 (1887) (multiple prosecutions). There is no occasion for the Court to consider whether escape is a continuing

offense for any of these purposes. In the present case, if respondents' initial departure was justified by duress, their conduct had not, at the time of departure, ripened into a completed offense for which they were criminally liable. The characterization of escape as a "continuing offense" when the duress defense is raised is but one way of explaining that the prisoner's duty to submit to custody continues into the period of liberty following the excused departure and that criminal liability will attach if he fails to satisy that duty.

3. Respondents further argue (Resp. Br. 71-82) that their indictments were defective because they did not notify respondents that the government would rely on the theory of escape as a continuing offense. But an indictment need only contain the "elements of the offense intended to be charged, 'and sufficiently apprise the defendant of what he must be prepared to meet,'" *Russell* v. *United States*, 369 U.S. 749, 763 (1962), quoting *Cochran and Sayre* v. *United States*, 157 U.S. 286, 290 (1895). Failure to return to custody voluntarily is not an essential element of the crime of escape.[8] The offense is complete when the prisoner gains his liberty for a period of time, either brief or extended, irrespective of how that liberty is later terminated. The indictments here (App. 9-10, 15) therefore fully explained the elements of a completed crime.

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[8] Contrary to respondents' contention (Resp. Br. 75), we did not argue in our opening brief that failure to return is an element of the offense. We noted only (Govt. Br. 48-49) that an absence from custody of at least some duration is implicit in the completed crime of escape.

The failure to return became relevant only when respondents raised the affirmative defense of duress. There was no need for the indictments to anticipate affirmative defenses by containing allegations that would negate them. *United States* v. *Sisson*, 399 U.S. 267, 288 (1970). It does not matter for these purposes whether, as a conceptual matter, the return requirement is properly viewed as a condition subsequent that must be satisfied in order to raise the duress defense in connection with the initial departure, or whether failure to satisfy the return requirement is better viewed as an element of the "continuing offense" of escape. In either event, existing case law (see Govt. Br. 32-33) put respondents fully on notice that in order to support a duress defense, they would have to justify their failure to return promptly. Cf. *Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972); *United States* v. *Vuitch*, 402 U.S. 62, 71-72 (1971).[9]

[9] In any event, the language of the indictment, referring to respondents' escape "[o]n or about August 26," was broad enough to embrace a departure on August 26 that did not give rise to criminal liability until respondents chose to stay away once they were free of the coercion they claim caused their departure. *United States* v. *Phipps*, *supra*. Moreover, contrary to respondents' contention (Resp. Br. 76, 79), the government's arguments before the trial judge put them on notice of the manner in which it would meet respondents' duress defense. At the beginning of the trial the prosecutor announced that he would oppose any jury instruction on the defense of duress because respondents admittedly failed to report promptly to proper authorities following their departure (App. 20).

Nor is there any substance to respondents' related claim (Resp. Br. 73-78) that the jury's verdict necessarily rested on their acts of departing and that affirmance of their convictions in this Court would impermissibly rest on different acts—their failure to return to custody. Once the duress defense was removed from the case by the district court (App. 225; Tr. 806-807), there was no occasion for the jury to focus on respondents' failure to return. Affirmance of their convictions by this Court on the ground that the duress defense was properly removed from the case would therefore rest, as did their original convictions, on the jury's finding that respondents did escape and flee from the D.C. Jail on or about August 26, 1976.[10]

4. Respondents appear to concede (Resp. Br. 106) that their departures from the D.C. Jail were not compelled by threats of imminent death or serious bodily injury of the kind ordinarily required in duress cases. But they argue (Resp. Br. 99, 104, 106) that the traditional limitation of the duress defense to "back-to-the-wall situations" (Pet. App. 53a, Wilkey, J., dissenting) should be relaxed in the prison escape context and that, in any event, the question of the nexus between their evidence of jail conditions and their admitted escapes was for the jury to consider.

[10] *Cole* v. *Arkansas*, 333 U.S. 196 (1948), in which the Court reversed a state supreme court's affirmance of a conviction under a different statutory provision than that under which the defendant was tried, therefore lends no support to respondents (see Resp. Br. 73). *Presnell* v. *Georgia*, 439 U.S. 14 (1978) (see Resp. Br. 73-75), is inapposite for the same reason.

This argument again misconceives the nature of the duress defense and the respective roles of the judge and jury in an escape case.

The widely accepted conditions set forth in *People* v. *Lovercamp*, *supra*, for the assertion of the duress defense to prison escape (Govt. Br. 29-30) represent a careful balancing of the strong societal interest in preserving prison discipline and protecting the safety of inmates, corrections officials, and the public on the one hand, and, on the other, a recognition that inmates may, in extreme situations, effectively have no choice but to escape rather than to suffer threats of death or serious physical harm. Note, *The Necessity Defense to Prison Escape After United States v. Bailey*, 65 Va. L. Rev. 359, 371 (1979). The specific requirement that the threatened harm be truly serious and immediate in order to justify a departure must therefore be viewed as a legal standard, not merely useful evidence for the jury to consider in determining whether the defendant was actually motivated by prison conditions rather than a desire to be free. Absent extreme conditions meeting the immediacy standard, the prisoner is required by law to continue to submit to confinement, and the jury accordingly, is not permitted to excuse his escape.

The logical extension of respondents' position is the elimination of any threshold quantum of proof as a condition of submitting the duress defense to the jury and, thereby, the effective elimination of a consistent and identifiable legal standard respecting the immediacy and seriousness of threatened harm

that would justify an escape. Respondents' argument is also fundamentally inconsistent with the doctrine that the defense of duress is, as a matter of law, only available when there was insufficient opportunity to avoid the threatened harm through pursuit of lawful alternatives, such as seeking protection of the courts or internal administrative remedies. See, *e.g.*, *United States* v. *Wood*, *supra*, 566 F. 2d at 1109; *Shannon* v. *United States*, *supra*, 76 F. 2d at 493. See generally Note, *The Necessity Defense to Prison Escape After United States v. Bailey*, *supra*, 65 Va. L. Rev. at 371-373.

5. Respondents seek to circumvent the strict immediacy requirement of the duress defense by contending (Resp. Br. 107-126) that the escape statute requires proof of intent to avoid normal conditions of confinement and that an escapee whose initial departure is allegedly motivated by intolerable conditions therefore lacks the intent necessary to commit the crime of escape. This assertion must be rejected for at least two reasons.

First, as we discussed in our opening brief (Govt. Br. 51-72), escape is a general intent crime. The only intent required is the intent to depart or to "go beyond permitted limits" (see, *e.g.*, R. Perkins, *Criminal Law* 504 (2d ed. 1969)).[11] Where, as here, the

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[11] Respondents contend (Resp. Br. 108, 116) that the distinction between general and specific intent offenses should be abandoned. But far from impeding analysis, as respondents suggest (*ibid.*), this distinction is often important in the articulation of the mens rea element of criminal liability. See, *e.g.*, *United States* v. *United States Gypsum Co.*, 438

prisoner's going "beyond permitted limits" was indisputably intentional, evidence that his motive might have been to avoid certain prison conditions is simply irrelevant to the issue of intent.[12]

U.S. 422, 444-445 (1978); *Morissette* v. *United States*, 342 U.S. 246, 270-271 (1952); *Dennis* v. *United States*, 341 U.S. 494, 500 (1951); *Screws* v. *United States*, 325 U.S. 91, 101-102 (1945).

Although the *Model Penal Code* does not preserve the concept of general intent, it does distinguish between intent involving only knowing commission of a criminal act and intent requiring, in addition, some particular purpose or objective. American Law Institute, *Model Penal Code* § 2.02(2) (Proposed Official Draft 1962). Escape requires only knowing or even reckless, not purposeful, conduct under the Code. *Id.* at §§ 2.02(3), 242.6(1). In the present case, of course, respondents knew that they were leaving custody, whatever may have been their purpose in doing so.

[12] The only escape cases respondents cite in support of their theory of intent are *United States* v. *Nix*, 501 F.2d 516 (7th Cir. 1974), and several cases decided by state courts of appeals in Florida (see Resp. Br. 118-120). The court in *Nix* defined escape as "a voluntary departure from custody with an intent to avoid confinement," 501 F.2d at 519, and concluded that gross intoxication could negate that intent, *id.* at 519-520. It is obvious that the intent the court had in mind was only the intent to leave the boundaries of confinement, not particular attributes of that confinement.

The Florida cases likewise do not support respondents. *Bravero* v. *State*, 347 So. 2d 781 (Fla. Dist. Ct. App. 1977), held that the defendant's testimony that he left custody to obtain medical treatment could support a finding that "he left confinement because of necessity rather than through a willful intent to avoid lawful confinement," *id.* at 784. Despite the reference to intent, it seems clear that the court was simply applying the necessity defense. That *Bravero* merely involved an application of the necessity defense is confirmed by the same court's later decision in *Watford* v. *State*, 353 So. 2d 1263 (Fla. Dist. Ct. App. 1978). The *Bravero* court's reference to the earlier decision in *Lewis* v. *State*,

More fundamentally, as Judge Wilkey concluded in his dissent, the practical result of holding the attributes of confinement to be relevant on the question of intent would be the "aboli[tion of] the salutary standards that heretofore have governed the defenses of duress and necessity" (Pet. App. 66a-67a) and the replacement of those carefully fashioned objective standards with "a nebulous and essentially deterministic view of 'voluntariness' * * * [that would permit the] [d]efendant * * * to adduce any and all evidence that may have some kind of bearing on his motivation * * *. This deterministic approach is a prescription for chaos and has been rejected in the criminal law for hundreds of years" (*id.* at 70-73a).

For these reasons, as well as those discussed in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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318 So. 2d 529 (Fla. Dist. Ct. App. 1975), also relied upon by respondents, indicates that this decision should be read in the same fashion. *Helton* v. *State*, 311 So. 2d 381 (Fla. Dist. Ct. App. 1975), the last of the Florida cases cited by respondents, merely held that some intent to avoid confinement is necessary—a point we do not dispute.

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